Supreme Court, U.S.
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No. 96-

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IN THE

Supreme Court of the United States

October Term, 1996

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,

Petitioner,

v.

REIMER & KOGER ASSOCIATES, INC., RONALD REIMER, KENNETH H. KOGER, CLIFFORD W. SHINSKI, BRENT MESSICK, ROBERT CREW, SHERMAN DREISESZUN, LELAND GERHART, I. I. OZAR, RAYMOND GIFFORD, HARRY S. JONAS, RANDALL M. NAY, FRANK SEBREE, TONY SALAZAR, PHILIP PISTILLI, MICHAEL K. RUSSELL, GAGE & TUCKER, PEAT, MARWICK, MITCHELL & CO., KPMG PEAT MARWICK, ROBERT SPENCE, THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN, MARILYN J, co-executor of the estate of FRANK S. MORGAN, ISABEL A. KIENE, executrix of the estate of RALPH E. KIENE, SHOOK, HARDY & BACON, C. PATRICK McLARNEY, substituted for SHOOK HARDY law firm, BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 17, 1996

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QUESTIONS PRESENTED

1. Whether decisions by federal district courts to exercise 28 U.S.C. § 1367 supplemental jurisdiction over state-law claims, following the dismissal before trial of all federal claims initially conferring jurisdiction, are subject-matter "jurisdictional" decisions that must be reviewed on appeal at the earliest opportunity, even *sua sponte*.

2. Whether abstention principles must be consulted in deciding if a federal district court commits legal error in employing 28 U.S.C. § 1367, in a removal context, to prevent a State from litigating its own solely state-law civil fraud claims in its own courts, where the *Younger* doctrine would bar the issuance of an injunction to achieve that result.

3. Whether 28 U.S.C. § 1446(d), directing a state court to "proceed no further" once a given case is removed to federal court, authorizes federal courts to enjoin continued litigation only of the *removed* case, not of *separate* cases that are legally distinct from the removed case despite their reliance on similar factual allegations.

RULE 29.6 STATEMENT

Petitioner, the Kansas Public Employees Retirement System, is "a body corporate and an instrumentality of the State of Kansas." K.S.A. § 74-4903. It has no parent company or subsidiary.

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OPINIONS BELOW

The decision of the court of appeals (Appendix ("App."), *infra*, 1a-14a) is reported at 77 F.3d 1063. The bench opinions and written order of the district court (App. 16a-35a) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 27, 1996. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on April 18, 1996 (App. 15a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statute governing the exercise of supplemental jurisdiction, 28 U.S.C. § 1367, provides in relevant part:

> **§ 1367. Supplemental jurisdiction**
>
> **(a)** Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> * * *
>
> **(c)** The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —
>
> **(1)** the claim raises a novel or complex issue of State law,
>
> **(2)** the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> **(3)** the district court has dismissed all claims over which it has original jurisdiction, or
>
> **(4)** in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1446(d) provides:

§ 1446. Procedure for removal

(d) Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

The All-Writs Act, 28 U.S.C. § 1651, provides in relevant part:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Anti-Injunction Act, 28 U.S.C. § 2283, provides:

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

12 U.S.C. § 1441a(*l*)(1) and 1441a(*l*)(3)(A) are reprinted in Appendix F (App. 36a).

STATEMENT OF THE CASE

1. Overview. This civil case was brought in Kansas state court by the State of Kansas, under Kansas law, against citizens of Kansas and other States, seeking recovery on its own behalf for fraud and other state-law torts. As filed, this case could not have been brought originally in federal court or removed to federal court. Nonetheless, it was removed to federal court after defendants (respondents here), in reaction to losing a key motion, filed meritless third-party claims against an entity whose status as a federally chartered corporation authorized it to remove the case.

After the case reached federal court, the third-party claims that provided the basis for removal were dismissed as meritless well before trial. However, instead of then sending the case back to state court and rebuking respondents for pursuing a wasteful jurisdictional gambit, the district court rewarded their machinations by asserting 28 U.S.C. § 1367 supplemental jurisdiction over the remainder of the case. Even more amazing was the district court's reaction when the State of Kansas — after enduring almost three years of federal litigation over various jurisdictional and procedural issues raised entirely by respondents' removal of the case — filed parallel actions in its own courts in August 1995. The district court quickly enjoined the State of Kansas from pursuing in its own courts these or any future related parallel actions, in order to protect the district court's exercise of the removal jurisdiction that it had obtained via the meritless third-party claims.

As a result of these events, the district court below currently holds a jurisdictional monopoly over a type of litigation — civil fraud claims brought solely under state law and pursued by Kansas in its sovereign capacity in lieu of a criminal prosecution — that Congress has never defined as part of the original or the removal jurisdiction of the federal courts, and that has long been protected as the exclusive province of the States. Even so, on appeal from the injunctions entered against the State of Kansas to bar its access to its own courts, the Eighth Circuit affirmed across the board, going so far as to hold that the injunctions were valid *even assuming* that the district court had abused its discretion in refusing to remand under Section 1367(c).

This case presents two basic issues involving Congress's recent codification of supplemental jurisdiction principles in 28 U.S.C. § 1367: whether decisions to *exercise* supplemental jurisdiction are subject-matter "jurisdictional" issues that must be reviewed on appeal at the earliest opportunity, even *sua sponte*; and whether Section 1367, particularly given Section 1367(c)(4)'s "exceptional circumstances" prong, requires that fundamental principles of abstention must be consulted in deciding if the exercise of supplemental jurisdiction is proper. Also at issue in this case, even if the first two issues were not before the Court, is a question that has divided the circuits concerning whether 28 U.S.C. § 1446(d)

authorizes federal courts to enjoin continued litigation only of the *removed* case, or whether it also permits injunctions of *separate* cases that are legally distinct from the removed case despite their reliance on similar factual allegations.

2. Procedural History

This lawsuit was filed in Kansas state court on June 5, 1991, by the Attorney General of the State of Kansas on behalf of the Kansas Public Employees Retirement System ("KPERS"), the State's agency responsible for maintaining and investing its employees' retirement monies.[1] The Attorney General brought the lawsuit to recover $65 million, plus interest, that KPERS lost as the result of alleged fraud and other tortious conduct against KPERS in connection with its 1986 investment in a Missouri-based savings and loan named Home Savings Association.[2] KPERS sued (either originally or in amended pleadings filed on December 23, 1991) various respondents including the former directors of Home Savings, who allegedly made fraudulent misrepresentations to KPERS to induce KPERS to make its investment, KPERS' former investment adviser, and its former accounting firm. Pltf. App. 6, 17. Other respondents were sued later.

On March 17, 1992, some of the respondents moved in the Kansas state trial court to dismiss KPERS' claims on statute-of-limitations grounds, asserting that KPERS had made its Home Savings investment in a proprietary capacity, that the ordinary

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[1] KPERS is "a body corporate and an instrumentality of the State of Kansas." K.S.A. § 74-4903. It is part of a complex state statutory and administrative scheme created "for the purpose of effecting economy and efficiency in the administration of governmental affairs." K.S.A. § 74-4901.

[2] In filing this litigation, the Attorney General was acting at the direction of the Kansas Legislative Joint Committee on KPERS Investment Practices. Plaintiff's Appendix in the Eighth Circuit ("Pltf. App.") 1599. Shortly after the Attorney General filed the lawsuit, he withdrew as an attorney of record and was replaced by private lawyers who were retained by KPERS to actually carry out the litigation. *See* Pltf. App. 8.

statutes of limitation therefore applied to KPERS' claims,[3] and that all of KPERS' claims were barred by the two- and three-year statutes of limitation for tort and statutory actions, respectively (K.S.A. §§ 60-512, 60-513). *See* App. 2a. On August 21, 1992, the state trial court issued an exhaustive opinion rejecting respondents' motion on the ground that, under Kansas law, KPERS had made the Home Savings investment in a governmental capacity, and hence that no statute-of-limitations period applied to KPERS' claims against respondents, so that all of KPERS' claims were timely. *See* Pltf. App. 170; App. 2a.

After losing this statute-of-limitations motion in the Kansas trial court, respondents made no effort to seek reconsideration or to pursue an interlocutory appeal. Instead, on October 2, 1992, they filed a third-party petition against Home Savings' receiver, the Resolution Trust Corporation (RTC), alleging that the RTC had negligently mismanaged Home Savings and had lost money that could have been used to repay part of KPERS' losses. Respondents also sought indemnification under 12 C.F.R. § 545.121. *See* Pltf. App. 30; *see also* Pltf. App. 62, Doc. # 171.

Respondents' petition was ultimately dismissed as unmeritorious for failure to state a claim, *see* Pltf. App. at 565-68, 651-54, 772-74, but not before the RTC predictably invoked 12 U.S.C. § 1441a(*l*)(3)(A) (*see* App. 36a) to remove the entire case to the Western District of Missouri, where Home Savings had its principal place of business. *See* Pltf. App. 204-08.[4] Despite

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[3] Under Kansas common law, a governmental entity such as KPERS is not generally subject to any statute of limitations. *E.g.*, *State ex rel. Stephan v. GAF Corp.*, 747 P.2d 1326 (Kan. 1987). By statute, Kansas has limited this rule to circumstances in which the entity is engaged in a governmental, as opposed to a proprietary, function. K.S.A. § 60-521.

[4] Following the removal, KPERS promptly moved to remand the case on the grounds that the third-party claims asserted against the RTC had been properly severed from the lawsuit before the RTC removed the case and, in any event, that the third-party claims against the RTC were frivolous. The district court denied KPERS' motion; the Eighth Circuit affirmed. *Kansas Public Employees Retirement Sys. v. Reimer & Koger Assoc., Inc.*, 4 F.3d 614 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 2132 (1994).

respondents' use of meritless and burdensome litigation against the RTC to obtain a federal forum for the case, the district court rewarded these tactics by declining to remand the case following the RTC's dismissal, *see* Pltf. App. 769-70 — even though the RTC had informed the district court that it had no interest in the case's remaining in federal court and that it assumed that the case would return to state court following the dismissal.[5]

Upon arriving in federal court, respondents moved for a second time, on November 25, 1992, to dismiss KPERS' claims against them as time-barred. The district court denied this motion. Disagreeing with the Kansas state trial court's ruling that KPERS had made its Home Savings investment in a governmental capacity, *see* Pltf. App. at 251-52, the district court nonetheless held that all of KPERS' claims were timely under the ten-year statute of limitations contained in a new statute specifically applicable to actions brought by KPERS (K.S.A. § 60-522, L. 1992, ch. 321, S. 21, enacted May 22, 1992). *See* App. 3a-4a; Pltf. App. at 535, 565-68.

An interlocutory appeal from that ruling was taken by respondents. Two and a half years after respondents filed their second statute-of-limitations motion, the Eighth Circuit ultimately ruled on the issue. On July 27, 1995, it issued a decision in which it disagreed with the construction of Kansas law reached by both the Kansas state trial court and the district court, holding that the standard two- and three-year statutes of limitation for tort and statutory actions, respectively, applied to KPERS' claims. *See* App. 4a.[6]

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[5] The RTC's counsel stated that the RTC had removed the case only "[f]or the purpose of pursuing our motion to dismiss. Once that's accomplished, the [RTC's] motion [to dismiss the third-party complaint] is ruled on, the RTC no longer has a reason or standing to be in the case. That's why we intervened for a limited purpose. The RTC's out of the case, there's no longer basis for federal court jurisdiction and it goes back to state court." Plaintiff's Supplemental Appendix at 2.

[6] Recently, on remand from the Eighth Circuit's decision with regard to the applicable statute of limitations, the district court held, completely contrary to the holding of the Kansas state trial court on respondents' first

3. The District Court's Ruling

At this point, frustrated by the nearly three years of wasteful federal litigation caused entirely by respondents' manipulative removal of the case and the district court's insistence on exercising supplemental jurisdiction even after the RTC's dismissal, and desiring to obtain an authoritative statute-of-limitations ruling from the Kansas appellate judiciary, KPERS filed two parallel lawsuits against respondents in a Kansas state trial court in August 1995. App. 4a, 21a; Pltf. App. 865-94, 895-941. A third parallel lawsuit had already been filed by KPERS in January. App. 21a; Pltf. App. 788-810. Remarkably, in two of the three parallel lawsuits, respondents quickly filed third-party claims against the RTC that were almost identical to those that had *already been dismissed as meritless* following the RTC's first removal. Pltf. App. 954, 1064. Within one day of these filings, the RTC predictably removed these two cases to the Western District of Missouri, just as it had done when it was impleaded in 1992. *See* App. 4a; Pltf. App. 1337, 1378.

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statute-of-limitation motion, that all of KPERS' claims against all of the respondents are barred under the Kansas statutes of limitation, terminating the case in its entirety. *See* Order Granting Motions for Summary Judgment dated June 3, 1996, in *Kansas Public Employees Retirement System v. Reimber & Koger Associates, Inc., et al.*, No. 92-0922-CV-W-9 (W.D. Mo., June 3, 1996).

Meanwhile, as the process of appellate review concerning the district court's application of the two- and three-year Kansas statutes of limitations is about to begin, the Kansas Supreme Court has accepted interlocutory review at the request of defendants in several separate cases brought by KPERS in Kansas trial court, in order to authoritatively resolve what Kansas statute of limitations applies to claims brought by KPERS: no limit (the view of the Kansas state trial court in this case); ten years (the view of the district court in this case); or two and three years (the view of the Eighth Circuit in this case). *See* Order in Kan. Sup. Ct. Case No. 96-76524-AS (May 3, 1996) (district court case Nos. 93CV389, 93CV588, 92CV433A, 92CV923, 92CV805). This procedure for authoritatively resolving the applicable statute of limitations would have begun four years ago had respondents in this case simply asked the Kansas Supreme Court for interlocutory review after they lost their initial motion, instead of filing meritless third-party claims against the RTC in order to hijack the case into federal court.

The respondent sued in the third new case, the KPMG Peat Marwick accounting firm, did not file any third-party claims against the RTC, and so that case was not removed. Instead, KPMG Peat Marwick filed a motion in the federal district court to enjoin KPERS from prosecuting this new Kansas state court action. App. 4a; Pltf. App. 1093. Further, the respondents in the newly removed cases filed motions to enjoin KPERS from filing future parallel actions against them. *See* App. 4a, 21a; Pltf. App. 942-46, 947, 1461.

The district court accepted removal of the newest cases impleading the RTC and, further, immediately issued a TRO to prevent "KPERS from filing any further actions in the future" as a means "to avoid further disruptions of this case," finding that "[i]t undermines my ability to effectively manage this case to have claims asserted elsewhere." App. 17a. Of KPERS' filing of the parallel Kansas cases, the district judge commented that "[I] now feel that I'm — I am in a boat with fewer and fewer rowers, at least fewer and fewer rowers that are pulling together," App. 18a, and as the basis for his decision explained: "I believe that I have reasonable power and authority to govern the conduct of the litigants in front of me so as not to interfere with the efficient administration of justice in this case." App. 19a.

KPERS opposed the preliminary injunction motions on a variety of jurisdictional grounds. The district court rejected all of KPERS' arguments. *See* App. 21a-35a. In the district court's view, the All Writs Act, 28 U.S.C. § 1651(a), authorized it "to enjoin duplicate cases from being pursued in other courts that would interfere with the processing of the pending case," because "the first court in which jurisdiction attaches has priority to consider the case" given the desirability of avoiding "multiplicity of litigation." App. 26a-27a.

4. The Eighth Circuit's Affirmance

On appeal, KPERS made three central arguments. First, KPERS argued that in reviewing the injunction, the Eighth Circuit was required to decide, as a subject-matter "jurisdictional" issue, whether or not the district court abused its discretion in refusing under 28 U.S.C. § 1367(c) to remand the case after the third-party

claims that had supported removal were dismissed as without merit; KPERS then argued in detail that the district court had abused its discretion under the four factors listed in Section 1367(c).[7] Second, KPERS argued that abstention principles must be consulted in applying Section 1367 and specifically that, as applied in this case, the district court's retention of the case, coupled with its injunction against litigation in any other court, violated the *Younger* doctrine.[8] Third, KPERS argued that the injunctions were invalid because a long line of precedent establishes that this Court has "never viewed parallel *in personam* actions as interfering with the jurisdiction of either court." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977); *see also Atlantic Coast Line R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 295-96 (1970); *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233-35 (1922).[9]

The Eighth Circuit rejected each of these arguments. On the first issue, the Eighth Circuit flatly refused to review KPERS'

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[7] Brief of Plaintiff-Appellant at 16-22; Reply Brief of Plaintiff-Appellant at 6-7, 12-14, 21-22. Applying the four factors laid out in Section 1367(c), KPERS argued that the district court had abused its discretion in exercising supplemental jurisdiction because: (1) both KPERS' claims and respondents' defenses raised novel and complex issues of Kansas law, particularly in the area of the statute of limitations, where public policy concerns are important; (2) the state-law claims obviously "substantially predominated" over the third-party claims against the RTC that had provided the basis for removal, and which had been quickly dismissed as meritless; (3) all claims that had provided removal jurisdiction had been dismissed before trial, and it made no sense to reward respondents for filing such meritless claims by permitting them to remain in federal court; and (4) established principles of comity favored adjudication of state claims in state court, particularly where a State itself is the plaintiff, constituting "exceptional circumstances" pointing toward an immediate remand. Brief of Plaintiff-Appellant at 16-22.

[8] Brief of Plaintiff-Appellant at 9-13; Reply Brief of Plaintiff-Appellant at 14-16.

[9] Brief of Plaintiff-Appellant at 23-25; Reply Brief of Plaintiff-Appellant at 2-6.

argument that the district court had abused its discretion in applying the four-factor test of Section 1367(c), holding: "Even if the district court abused its discretion in retaining the case, the court would not be without jurisdiction." App. 7a. In so doing, the Eighth Circuit noted but rejected holdings by the D.C. Circuit and the Seventh Circuit "that the question of whether to retain a case after dismissing federal claims is jurisdictional." App. 7a n.3.

On the second issue, the Eighth Circuit treated the *Younger* doctrine as simply irrelevant under both Section 1367(c) and the special RTC removal statute relevant to the remand, holding that *Younger*'s comity concerns need not be considered at all in deciding whether to remand the case to state court following the dismissal of the meritless third-party claims that had been the basis of removal. *See* App. 6a, 14a.

On the third issue, the Eighth Circuit did not dispute the settled rule that, in general, a federal court lacks authority to enjoin parallel *in personam* actions on the theory that such duplicate litigation somehow "interferes" with the federal court's jurisdiction. App. 13a n.6. Thus, the Eighth Circuit declined to endorse the district court's main rationale for the sweeping injunction that it had entered to prevent the State of Kansas from prosecuting civil suits on its own behalf in its own courts. See p. 8, *supra*. Rather, the Eighth Circuit affirmed the injunctions on the theory that 28 U.S.C. § 1446(d), directing a state court to "proceed no further" once a given case is removed to federal court, authorizes federal courts to enjoin continued litigation not only of *the removed case*, but also of *separate cases* that are legally distinct from the removed case (despite their reliance on similar factual allegations). *See* App. 9a-13a.

REASONS FOR GRANTING THE WRIT

1. The first question presented concerns the Eighth Circuit's refusal even to address KPERS' powerful showing that the district court abused its discretion under 28 U.S.C. § 1367(c) in refusing to remand this case after the third-party claims against the RTC, which had provided the basis for removal, had been dismissed as meritless — even after the RTC made clear that it had no interest

in the case remaining in federal court. *See* pp. 6 & note 5, 9 & note 7, *supra*. Thus, the Eighth Circuit held, in admitted conflict with decisions in two other circuits, that "[e]ven if the district court abused its discretion in retaining the case, the court would not be without jurisdiction." App. 7a & n. 3.[10]

The Eighth Circuit's view derives from a highly contestable reading of the two-prong test for the exercise of supplemental jurisdiction that was laid out by this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988).[11] According to the Eighth Circuit, these cases draw a sharp demarcation between the "power to exercise jurisdiction" over supplemental claims, which is supposedly satisfied in every case by the mere existence of subject-matter jurisdiction at the start of the case, and "the advisability of exercising such jurisdiction." App. 6a-7a. Thus, the Eighth Circuit simply refused to "review the propriety of the district court's decision to retain supplemental jurisdiction," even though it affirmed in its entirety the injunctive relief issued by the district court. App. 7a.

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[10] The Eighth Circuit briefly suggested that this Section 1367(c) issue could be avoided by construing Section 1367 as simply inapplicable in a case like this. Under this theory, the district court would have no discretion at all to remand the case, despite the meritless nature of the underlying third-party claims against the RTC used to hijack the case to federal court, because the special removal statute relied on by the RTC supposedly "gave the court arising-under jurisdiction of the entire case," forever. App. 6a; *see also* App. 12a. This view adds merely a minor feature to the second question presented by this case. As explained below, see pp. 14-15, *infra*, elementary principles of statutory interpretation require that the framework established by Congress for discretionary remands under Section 1367(c) be interpreted in light of principles of comity long applied by this Court. Given these principles, the only significance of the special RTC removal statute is that federal jurisdiction existed in this case at the time of removal, satisfying Section 1367(a); discretion must remain to remand the case under Section 1367(c).

[11] 28 U.S.C. § 1367(a) & (c) essentially codified this two-prong *Gibbs* framework. *See, e.g., Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1266 (D.C. Cir. 1995); *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1182 (7th Cir. 1993).

The Eighth Circuit's attempt to pigeonhole all Section 1367(c) decisions as not subject-matter "jurisdictional," and as involving only "discretion" — so that they need never be reviewed on appeal from an injunction, or *sua sponte* on appeal — is highly dubious. Elements of discretion pervade many aspects of jurisdictional doctrine. *See generally* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985). There are certainly cases involving discretionary decisions in which it makes sense to view the issue as whether the particular jurisdictional statute involved can be construed to permit the result reached by the district court based on the exercise of discretion — thus posing a legal issue, involving the judicial "fine tuning" of the jurisdictional statute, which must be reviewed at the earliest opportunity on appeal. *See id.* at 561-62 & n.115, 574, 583.

The decisions of the Seventh and D.C. Circuits that the Eighth Circuit refused to follow have adopted this basic approach. Far from being in conflict with this Court's *Gibbs* and *Cohill* decisions, as the Eighth Circuit claims, *see* App. 7a n.3, the Seventh and D.C. Circuits are actually enforcing a key feature of those cases. In *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 & n.4 (7th Cir. 1987), the Seventh Circuit held, *sua sponte*, that the district court had erred in reaching the merits of pendent state-law claims following the dismissal of the federal claim before trial. It did so to enforce the "general rule" laid out in *Gibbs* that, absent "pressing reasons" to retain jurisdiction, where "the federal claim is dismissed before trial, the district court should relinquish jurisdiction of any pendent state law claim" if no continuing basis for federal jurisdiction exists. *Id.* at 1218 (citing *Gibbs*, 383 U.S. at 726).[12] The Seventh Circuit observed that "because the rule is jurisdictional, we are obligated to raise it ourselves," *id.* at 1218 n.4, and it held that because the record revealed no "pressing reasons for retaining jurisdiction . . . it was therefore an abuse of discretion for [the district court] to do so." *Id.* at 1218.

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[12] This general rule continues under Section 1367(c). *See, e.g.*, *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994).

The Seventh Circuit's reasoning in *Maguire* was endorsed recently by the D.C. Circuit sitting *en banc*. In *Lashawn A. v. Barry*, No. 94-7044, 1996 U.S. App. LEXIS 16256 (D.C. Cir. July 9, 1996) (en banc) (earlier panel decision cited by Eighth Circuit at App. 7a n.3), the court held that although *most* district court decisions regarding supplemental jurisdiction are not subject-matter "jurisdictional," *see id.* at *19-*22, "the *Gibbs* 'rule' that 'if the federal claims are dismissed before trial . . . the state claims should be dismissed as well" *is* "treated as 'jurisdictional.'" *Id.* at *22-*23 (quoting dissenting opinion and citing *Gibbs*, 383 U.S. at 726). In a dissenting opinion, two members of the court took an even broader view of why supplemental jurisdiction decisions generally should be treated as subject-matter "jurisdictional." *See id.* at *49-50 (Williams, J., joined by Henderson, J., dissenting) ("Here, the practical actions of courts . . . mark *Gibbs'* second step as jurisdictional") (citing Shapiro, *supra*, 60 N.Y.U. L. Rev. at 561-62); *see also id.* at *27, *42-*51.

Plainly, whether or not the second step of the *Gibbs* analysis qualifies as subject-matter "jurisdictional," at least where the federal basis for a lawsuit has disappeared before trial, is a fundamental issue of broad applicability. Indeed, this question persists under Section 1367(c). See notes 11 & 12, *supra.* Although only three circuits currently appear to be involved in a direct conflict over this issue, the lack of serious attention given by the other circuits to this important and recurring issue only serves to underscore the strong need for this Court to spell out, one way or the other, the duty of the courts of appeals with respect to discretionary jurisdictional determinations made by district courts under Section 1367(c). Certiorari should therefore be granted on this issue.

2. If this Court were to grant certiorari on the first question and if it agreed with KPERS, on the merits, that the Eighth Circuit erred in refusing to review the district court's exercise of discretion under Section 1367(c), then this Court would presumably remand the case and direct that the Eighth Circuit perform that function in the first instance, applying the four factors laid out in Section 1367(c). See p. 1, *supra*; see also p. 9, note 7, *supra* (summarizing KPERS'

arguments below under these four factors). Thus, we would not expect this Court itself to analyze these four factors, applied to the record of this case, without the benefit of the views of the court of appeals. However, we do urge this Court to accept certiorari on the second question so that, if it does agree with KPERS on the first question, this Court will be positioned to clarify for the Eighth Circuit on remand, and for the courts of appeal generally, the relevance under Section 1367(c) of abstention doctrines and other principles of comity.

On its face, this case presents enormous issues of comity. Private civil defendants accused of committing a massive fraud against on the State of Kansas have, through a series of brazen procedural manipulations, managed to get Kansas enjoined from litigating its solely state-law claims in its own courts, so that it is forced to litigate them in a federal court in Missouri. This substantial burden has been imposed on Kansas even though the case could never have been commenced in Missouri federal court, or in any federal court, by either side. Given the extraordinary posture of this case, the statutes governing whether the district court retained jurisdiction to hear the case cannot be considered in a vacuum.

In particular, as we urged the Eighth Circuit without effect, see p. 9 & note 8, *supra*, the district court's continued exercise of jurisdiction in the case, coupled with its injunction against litigation in any other court, violates the *Younger* doctrine (*see Younger v. Harris*, 401 U.S. 37 (1971)). Obviously, it is clear that under *Younger* itself, if respondents had been criminally prosecuted for their alleged fraud by the State of Kansas, in its own courts, respondents could not have enjoined those proceedings. Likewise, under *Trainor v. Hernandez*, 431 U.S. 434, 444-47 (1977), it is clear that the civil proceeding which the State of Kansas instead filed against respondents, in an effort to simply recover the proceeds from respondents' alleged fraud, could not have been enjoined by any federal court. It is only because of respondents' filing of meritless third-party claims against the RTC, the district court's refusal to remand this cases after those claims were dismissed, and the district court's issuance of injunctions to "protect" its removal jurisdiction that the district court has obtained

a jurisdictional monopoly over this case. Nonetheless, the Eighth Circuit ruled that *Younger* was simply irrelevant in deciding whether the relevant jurisdictional statutes permitted the district court to keep the case. *See* App. 14a.

KPERS urges this Court to address, prior to a remand, the relevance of abstention and other comity principles in this context, to prevent the circumvention of these principles and to ensure that respondents and other litigants are not rewarded for engaging in such burdensome jurisdictional machinations. Certainly, there is ample support for the view that abstention principles must be consulted in addressing whether or not it would be an abuse of discretion for a district court to continue hearing a case once the initial basis for federal jurisdiction disappears. *See, e.g.*, *Hagans v. Lavine*, 415 U.S. 528, 558-59 (1974) (Powell, J., joined by Burger, C.J. and Rehnquist, J. (now C.J.)) ("Of course, a decision to deny pendent jurisdiction on the ground that state courts should consider questions of state law naturally involves issues relevant to the question of abstention"); Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendations for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 374 (1990) ("The doctrines of supplemental jurisdiction and abstention present the federal courts with a host of interrelated concerns which deal primarily with judicial efficiency and the proper allocation of power between the state and federal judicial systems"); Shapiro, *supra*, 60 N.Y.U. L. Rev. at 580-81 ("federalism and comity concerns have been critical to the exercise of discretion in federal courts and should remain so").

3. Finally, regardless of whether this Court accepts review on the first two questions, and regardless of how it rules, certiorari is warranted on the third question in order to resolve a clear circuit conflict concerning the proper scope of injunctions that may issue under 28 U.S.C. § 1446(d).

The Eighth Circuit did not sustain the injunctions entered against the State of Kansas based on the district court's novel theory that it enjoyed broad power under the All Writs Act to enjoin parallel *in personam* litigation simply because it regarded such litigation as disruptive. See pp. 8-9, *supra*. Rather, the Eighth

Circuit held that Section 1446(d)'s directive that a state court must "proceed no further" once a case is removed to federal court authorized all the injunctions. *See* App. 9a-13a. Conceding that the plain language of Section 1446(d) "only commands the state court to stay the case that was actually removed," the Eighth Circuit cited authority from the Fifth and Ninth Circuits supposedly endorsing the idea that Section 1446(d) may be employed to enjoin any plaintiff in a removed case from filing a later state-court action that is crafted "for the purpose of subverting federal removal jurisdiction." App. 9a.

In fact, the cases cited by the Eighth Circuit reveal that both the Fifth and Ninth Circuits have *rejected* such a theory, with analysis that is directly contrary to the Eighth Circuit's construction of Section 1446(d). In *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 900-01 (5th Cir. 1975) (per curiam), the Fifth Circuit refused to permit an injunction against a parallel suit, filed after the first suit was removed on diversity-of-citizenship grounds, where the parallel suit named a non-diverse defendant with the obvious aim of preventing its removal. The Fifth Circuit indicated that because no *fraudulent joiner* existed (because the claims against the non-diverse defendant were valid), Section 1446(d) did not authorize an injunction. Agreeing with *Frith*, in *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), the Ninth Circuit held that Section 1446(d) permits, at most, injunctions against the refiling of "essentially the same suit in state court" when it is obvious that the suit is removable. *Id.* at 740-41. Here, of course, neither the 1991 nor the 1995 suits filed by KPERS in Kansas state court were removable; only respondents' meritless third-party practice has led to removal. Under the construction of Section 1446(d) adopted by the Fifth and Ninth Circuits, the injunctions against KPERS are invalid; a square circuit conflict is therefore present, and this Court's review is warranted to address this recurring and important issue of judicial federalism.

CONCLUSION

For all these reasons, certiorari should be granted.

Respectfully submitted.

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July 17, 1996

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 95-3499

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Plaintiff—Appellant,

v.

REIMER & KOGER ASSOCIATES, INC., a Kansas Corporation; RONALD REIMER, an individual; KENNETH H. KOGER, an individual; CLIFFORD W. SHINSKI, an individual; BRENT MESSICK, an individual; ROBERT CREW, an individual; SHERMAN DREISESZUN, an individual; LELAND GERHART, an individual; I. I. OZAR, an individual; RAYMOND GIFFORD, an individual; HARRY S. JONAS, an individual; RANDALL M. NAY, an individual; FRANK SEBREE, an individual; TONY SALAZAR, an individual; PHILIP PISTILLI, an individual; MICHAEL K. RUSSELL, an individual; GAGE & TUCKER, a law partnership; PEAT, MARWICK, MITCHELL & CO., an accountancy firm; KPMG PEAT MARWICK, an accountancy firm; ROBERT SPENCE, an individual; THOMAS S. MORGAN, co-executor of the estate of FRANK S. MORGAN; MARILYN J, co-executor of the estate of FRANK S. MORGAN; ISABEL A. KIENE, executrix of the estate of RALPH E. KIENE,
Defendants—Appellees,

SHOOK, HARDY & BACON; C. PATRICK McLARNEY, Substituted for SHOOK HARDY law firm; BLACKWELL SANDERS MATHENY WEARY & LOMBARDI, L.C.,
Intervenor-Defendants—Appellees.

Submitted: December 13, 1995
Filed: February 27, 1996

Before McMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

[1065] JOHN R. GIBSON, Circuit Judge.

In this, the fourth interlocutory appeal in the Kansas Public Employees' Retirement System (KPERS) case, KPERS seeks review of the district court's[1] order enjoining KPERS from prosecuting lawsuits in Kansas based on the same claims being litigated in this case. Because we conclude that the effect of the Kansas lawsuits is to subvert the district court's removal jurisdiction, we affirm the district court's order.

KPERS invested $ 65 million in debentures of Home Savings Association, a Missouri-based savings and loan that failed. The RTC was appointed receiver for Home Savings. KPERS filed this case in Kansas state court on June 5, 1991 against Reimer & Koger Associates, KPERS's former investment advisers, seeking to recoup the $ 65 million. While the case was still pending in state court, KPERS also joined as defendants various officers and directors of Home Savings; Michael Russell, KPERS's own former chairman of the board; KPMG Peat Marwick, KPERS's accountants; and Gage & Tucker, KPERS's former lawyers. KPERS alleged only state-law claims.

The defendants promptly moved for summary judgment in the state court on the ground that KPERS's suit was barred by the Kansas two- and three-year statutes of limitations. The Kansas court ruled that KPERS was not subject to any statute of limitations and so denied the summary judgment motion. Then the Home Savings defendants impleaded the RTC, Home Savings's successor, which has a statutory right to remove any case to which it is a party to its choice of three federal district courts. When KPERS learned that the RTC had been impleaded, it had the third-party claims severed by ex parte proceedings in the Kansas court before the RTC could remove. Despite the severance, the

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[1] The Honorable Brook D. Bartlett, Chief Judge, United States District Court for the Western District of Missouri.

RTC removed the entire case to the federal district court for the Western District of Missouri; the district court held that the severance by the Kansas court was ineffective to prevent removal of the entire case, and we affirmed that holding. **[1066]** *KPERS v. Reimer & Koger Assocs.*, 4 F.3d 614 (8th Cir. 1993) (*KPERS I*), *cert. denied*, 128 L. Ed. 2d 862, 114 S. Ct. 2132 (1994).

In the Western District of Missouri, the RTC moved to dismiss the third-party claims against it, and the district court granted its motion. The Home Savings defendants moved for reconsideration of the dismissal and the court granted the RTC the right to intervene for the limited purpose of defending the reconsideration motion and protecting its right to any derivative claims belonging to Home Savings that KPERS might assert; the court then reaffirmed its earlier dismissal of the claims against the RTC and held that KPERS was not asserting any derivative claims. In the wake of the RTC's dismissal, KPERS moved to remand the case to the Kansas state court, but the district court decided to retain jurisdiction of the case under 28 U.S.C. § 1367 (1994), the supplemental jurisdiction statute.

KPERS threatened to sue two additional law firms, Shook, Hardy, and Bacon and Blackwell, Sanders, in state court.[2] The law firms sought leave to intervene in the federal case. The district court allowed Shook, Hardy to intervene as a defendant and denied Blackwell, Sanders's motion to intervene. We reversed and allowed Blackwell, Sanders to intervene, although not as a defendant. *KPERS v. Reimer & Koger Assocs.*, 60 F.3d 1304 (8th Cir. 1995) (*KPERS II*). KPERS amended its complaint in federal court to add Shook, Hardy as a defendant.

Once in federal court, the defendants renewed their motion for summary judgment on the basis of the statute of limitations. The district court reconsidered the question decided by the state court

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[2] KPERS also threatened to sue Boatmen's First National Bank, the trustee on the indentures. Boatmen's sued in federal court for declaratory relief and obtained a preliminary injunction prohibiting KPERS from suing Boatmen's elsewhere. We reversed that injunction because it was not based on adequate findings of fact and conclusions of law. *Boatmen's First Nat'l Bank v. KPERS*, 57 F.3d 638 (8th Cir. 1995).

and concluded that KPERS was subject to a statute of limitations, but that the applicable statute was ten years. The defendants took an interlocutory appeal from the holding that the ten-year statute was applicable. We reversed, holding that the ten-year statute was inapplicable and remanding for determination of which of the shorter statutes should be applied. *KPERS v. Reimer & Koger Assocs.*, 61 F.3d 608, 614-16 (8th Cir. 1995) (*KPERS III*), *cert. denied*, 133 L. Ed. 2d 845, 64 U.S.L.W. 3557, 1996 U.S. LEXIS 984, 116 S. Ct. 915 (Feb. 20, 1996).

On August 23, 1995, about a month after we announced our decisions in *KPERS II* and *KPERS III*, KPERS filed two new cases in the Kansas courts. In the first of these cases, KPERS sued Michael Russell; the Reimer & Koger defendants; and Shook, Hardy for damages arising out of the Home Savings investments. In the second, KPERS sued Peat, Marwick for negligence and breach of contract in auditing KPERS. Earlier, in January 1995 KPERS had also sued Blackwell, Sanders in state court for damages arising out of the Home Savings investments. One of the counsel for KPERS made a statement to the press, made part of the record below, that KPERS filed the cases in Kansas because of a "multitude of problems and issues that are causing delays in federal court, coupled with what we think is an erroneous decision by the 8th Circuit in interpreting the Kansas statute of limitations."

On September 11, 1995, Blackwell, Sanders and Shook, Hardy impleaded the RTC in their respective state court cases. The next day, the RTC removed both cases to the federal district court for the Western District of Missouri. Peat, Marwick did not implead the RTC and, therefore, its case is still pending in state court.

Blackwell, Sanders and Shook, Hardy moved in the original federal court action to enjoin KPERS from filing further state court actions against them, and Peat, Marwick moved to stay the pending state court action. In a brief filed with the district court in opposition to the motions for preliminary injunctions, KPERS stated, "Insofar as the Eighth Circuit was purporting to interpret Kansas law, KPERS has every right to seek reexamination of those questions in the **[1067]** courts of its own state, and the duty to do so when an erroneous federal court decision may effectively rob it of its day in court. State courts, of course, are not bound to follow

federal interpretations of state law."

The district court granted the injunctions. The court held that KPERS asserted claims in the new state lawsuits that were substantially identical to the claims KPERS asserted against the same parties (other than Blackwell, Sanders) in the original KPERS case pending before the district court. The court observed that "based on the information furnished by the parties . . . the reason the August 23, 1995, cases were filed by KPERS was to attempt to obtain Kansas courts' more favorable rulings on the statute of limitations issue decided by the 8th Circuit Court of Appeals and also to escape a multitude of problems and issues that are causing delays in federal court." The court held that the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), did not prohibit the grant of injunctive relief in this case. The court also held that the All Writs Act, 28 U.S.C. § 1651(a) (1994), authorized the relief, and that relief was appropriate under Northwest Airlines v. American Airlines, 989 F.2d 1002 (8th Cir. 1993). The court preliminarily enjoined KPERS from filing any further lawsuits arising out of the Home Savings investments against Shook, Hardy; Reimer & Koger; Blackwell, Sanders; Peat, Marwick; and defendants related to the firms named above. The court also enjoined KPERS from pursuing its existing Kansas case against Peat, Marwick.

KPERS appeals the injunctions, arguing that they were not authorized by the All Writs Act, 28 U.S.C. § 1651(a). It also argues that the district court should have denied the injunctions and remanded the original federal case to the state courts under federal abstention doctrines.

I.

KPERS devotes much of its brief to arguing that the district court erred in refusing to remand the first KPERS case to the state court after the RTC was dismissed. KPERS has not sought interlocutory review of that question directly. However, KPERS argues that if the district court erred in retaining jurisdiction, the court then lacks jurisdiction over the case and any injunction issued to protect the court's non-existent jurisdiction of this case is therefore erroneous.

We observe first, that the district court articulated two theories to justify its refusal to remand the case. First, the court concluded that it was an appropriate occasion for exercising supplemental jurisdiction under 28 U.S.C. § 1367, despite the dismissal of the RTC. Later, the court also stated that 12 U.S.C. § 1441a(*l*) gave the court arising-under jurisdiction of the entire case, so that exercise of supplemental jurisdiction was not even necessary. KPERS's argument goes only to the propriety of supplemental jurisdiction, not to the district court's alternative theory. However, under 12 U.S.C. § 1441a(*l*)(1) once the RTC becomes a party to the case, the entire action is "deemed to arise under the laws of the United States" and is within the original jurisdiction of the district court. Therefore, the federal court has arising-under, rather than supplemental, jurisdiction even over the claims that do not involve the RTC. *Spring Garden Assocs. v. RTC*, 26 F.3d 412, 417 (3d Cir. 1994).

At any rate, KPERS cannot prevail even if we limit our analysis to supplemental jurisdiction. In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 349 (1988), the Supreme Court distinguished between the power to exercise jurisdiction over pendent (or supplemental) claims and the advisability of exercising such jurisdiction. Under the familiar test, "a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case 'derive from a common nucleus of operative fact' and are 'such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding.'" *Cohill*, 484 U.S. at 349 (quoting *Gibbs*, 383 U.S. at 725). The existence of this jurisdiction is determined at the time of removal, even though subsequent events may remove from the case the facts on which jurisdiction **[1068]** was predicated. *Bank One Texas Nat'l Ass'n v. Morrison*, 26 F.3d 544, 547 (5th Cir. 1994); *see KPERS I*, 4 F.3d at 622.

On the other hand, the decision of whether to exercise supplemental jurisdiction after dismissal of the federal claim is discretionary. *Cohill*, 484 U.S. at 349 ("*Gibbs* drew a distinction between the power of a federal court to hear state-law claims and

the discretionary exercise of that power.") It is the district court's decision to retain jurisdiction, not the existence of jurisdiction in the first place, which KPERS contends was improper. In fact, we decided the first question, the existence of jurisdiction, in *KPERS I*, 4 F.3d at 622. Even if the district court abused its discretion in retaining the case, the court would not be without jurisdiction. In *Condor Corp. v. City of St. Paul*, 912 F.2d 215 (8th Cir. 1990), we held that "it would have been more appropriate for the federal district court, once rejecting the federal claims, to have exercised its discretion and not passed on the pendent claim." *Id.* at 220. However, the district court had in fact retained and decided the pendent claim. Despite our conclusion that the district court should not have decided the pendent claim, on appeal we proceeded to review the state claim on the merits. *Id.* at 220-21. We could not have done so if the district court had lacked subject-matter jurisdiction.[3] Therefore, we need not review the propriety of the district court's decision to retain supplemental jurisdiction in order to decide this appeal.

II.

The most troublesome question in this appeal is whether the Anti-Injunction Act, 28 U.S.C. § 2283, forbids the district court's order. KPERS treats this issue only in a footnote on the last page of its brief. Though the Home Savings defendants urge us to consider this point waived, KPERS does cite cases interpreting the Anti-Injunction Act, and we cannot intelligibly discuss those cases without considering the Act itself.

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[3] We are aware of statements in *LaShawn A. v. Barry*, 69 F.3d 556, 562-63 (D.C. Cir. 1995), *vacated*, 1996 U.S. App. LEXIS 4404, 1996 WL 32955 (Jan. 30, 1996), and *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 n.4 (7th Cir. 1987), that the question of whether to retain a case after dismissing federal claims is jurisdictional. We consider these statements to conflict with the Supreme Court's language in *Cohill* and *Gibbs* and to be inconsistent with our action in *Condor Corp.*

The Anti-Injunction Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The Anti-Injunction Act prohibits federal courts from enjoining proceedings in state courts unless the injunction falls within one of three exceptions. *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970). Courts must construe the exceptions to the Anti-Injunction Act narrowly and resolve doubts in favor of letting the state action proceed. *Id.* at 297; *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (plurality).

The district court's orders in the Shook, Hardy and Blackwell, Sanders cases did not enjoin any case currently pending in the Kansas courts, since the cases filed in August 1995 were removed and no new case has been filed. The Anti-Injunction Act does not apply if there is no state litigation in progress when the federal court issues its injunction. *National City Lines v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982).

On the other hand, the Peat, Marwick case was not removed. It involves only state-law claims and Peat, Marwick did not implead the RTC. Thus, the Peat, Marwick injunction falls within the Anti-Injunction Act, unless one of the exceptions fits.

The district court held that all three exceptions to the Anti-Injunction Act applied to the Peat, Marwick case. However, Peat, Marwick limits its argument to the first exception--it contends that the injunction was authorized by an act of Congress.[4]

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[4] The other two exceptions are known as the "in rem" exception, *Lektro-Vend Corp.*, 433 U.S. at 641; *In re Federal Skywalk Cases*, 680 F.2d 1175, 1183 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982), and the "relitigation" exception, *NBA v. Minnesota Pro. Basketball, Ltd. Partnership*, 56 F.3d 866, 871 (8th Cir. 1995). The "relitigation" exception may be applicable, but would only support a narrowed injunction, not the blanket prohibition against further litigation that the district court entered in this case. *See id.* at 871-72.

[1069] The statute governing removal procedures, 28 U.S.C. § 1446 (1994), provides that after the defendant has given notice of removal and filed the notice with the state court, the state court "shall proceed no further unless and until the case is remanded." 28 U.S.C. § 1446(d). This language has been considered express authorization to stay state court proceedings; therefore, injunctions to stay state proceedings in removed cases come within the first exception to the Anti-Injunction Act. *See Mitchum v. Foster*, 407 U.S. 225, 234 & n.12 (1972); *Lektro-Vend. Corp.*, 433 U.S. at 640.

Although the removal statute only commands the state court to stay the case that was actually removed, it has been interpreted to authorize courts to enjoin later filed state cases that were filed for the purpose of subverting federal removal jurisdiction. In *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899 (5th Cir. 1975) (per curiam), the Fifth Circuit stated that a district court could enjoin a state court case filed after removal if the second case was "an attempt to subvert the purposes of the removal statute." *Id.* at 901. *Lou v. Belzberg*, 834 F.2d 730 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988), recognizes the rule enunciated in *Frith*, stating, "It would be of little value to enjoin continuance of a state case after removal and then permit the refiling of essentially the same suit in state court." *Id.* at 741. *Lou* then somewhat clouds its statement by seemingly requiring a fraudulent filing in an attempt to subvert the removal but later states the rule in the disjunctive. *Id.* at 741.

In diversity cases, the federal court's jurisdiction can be subverted by fraudulent joinder of resident defendants to defeat diversity. *Frith* was a diversity case in which, after removal, the plaintiff filed a second suit in state court on the same claim, but joined a resident defendant, so that the defendants could not remove. The defendants removed anyway, relying on the doctrine of fraudulent joinder. The plaintiff moved to remand the second case, and the district court hearing that case granted the remand, specifically finding that the case did not fit within the doctrine of fraudulent joinder. 512 F.2d at 900. The defendants next obtained an injunction in the first, properly removed case prohibiting the plaintiff from proceeding in the state action. The Fifth Circuit reversed the injunction, saying that the second court's finding that

there was no fraudulent joinder was an implicit finding that "the second suit was not brought in an attempt to subvert the purposes of the removal statute and was not aimed at defeating federal jurisdiction." *Id.* at 901. *See also Myers v. Hertz Penske Truck Leasing*, 572 F. Supp. 500 (N.D. Ga. 1983).

The fraudulent joinder of non-diverse defendants is not relevant in cases based on federal question, rather than diversity, jurisdiction.[5] However, the same principle articulated in *Frith* applies in federal question cases: after removal the plaintiff cannot file essentially the same case in a second state action to subvert federal jurisdiction. In *Lou* the plaintiff first combined state and federal claims in a state court suit alleging derivative claims on behalf of a corporation and claims on behalf of a class consisting of the corporation's shareholders. After the defendants removed the first case, a second plaintiff, who was represented by the same attorneys and was also a shareholder, filed a second suit in state court in which she "asserted additional state law claims and **[1070]** omitted the federal claims." 834 F.2d at 733. The federal district court in the removed case enjoined the state court suit. The Ninth Circuit recognized that a federal court must have the ability to enjoin state proceedings that are filed to subvert the purposes of the relevant federal removal statute. *See* 834 F.2d at 741. However, on the facts before it, the Ninth Circuit reversed the injunction on the ground that it was barred by the Anti-Injunction Act. The district court had not found that the second suit was "fraudulent or an attempt to subvert the purposes of the removal statute." *Id.* at 741. The second suit involved "different plaintiffs, additional counsel, additional defendants, and only state claims." *Id.* at 741. Therefore, there was no basis for concluding that the new suit was merely a refiling of the old suit in "an attempt to subvert the purposes of the

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[5] KPERS contends that under *Frith* and *Lou* a federal court can only enjoin a second suit in cases of fraudulent joinder. This is an unduly narrow reading; we read those cases to mean that fraudulent joinder is one way in which a plaintiff can improperly attempt to subvert removal jurisdiction. That it is not the only way is demonstrated by the discussion of subversion of jurisdiction in *Lou v. Belzberg*, a federal question case.

removal statute," 834 F.2d at 741, and the district court erred in enjoining it. *Accord Billy Jack for Her, Inc. v. New York Coat, Suit, Dress, Rainwear and Allied Workers' Union*, 515 F. Supp. 456, 460 (S.D.N.Y. 1981) (denying injunction of second suit because "this is not a case where the plaintiff in the removed action has flouted the federal court's removal jurisdiction by filing substantially the same complaint in state court subsequent to the removal.")

In this case, the district court specifically found that KPERS's newly filed state suit against Peat, Marwick was an attempt to subvert the removal of the earlier case. The court further found that the new suit was substantially identical to the old and that KPERS had merely tried to "carve up what was one case into separate cases with separate claims, all leading to a subversion of the RTC's right to remove the entire case." The record fully supports these findings as KPERS made clear not only in a brief filed with the district court, but also in a statement to the press, that the purpose of filing the second action was to obtain a favorable decision in the Kansas courts on the statute of limitations issue decided by this court, which KPERS believed to be erroneous. The district court's findings are not clearly erroneous.

The wording and purpose of the RTC removal statute, 12 U.S.C. § 1441a(*l*), require that a federal forum be available for the entirety of any case to which the RTC is a party. Section 1441a(*l*)(1) bases federal jurisdiction on the existence of the RTC as a party: "Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding." We held in *KPERS I* that the purpose of section 1441a(*l*) included more than just providing a federal forum for claims asserted directly against the RTC. *KPERS I*, 4 F.3d at 620 & n.5. We held that the state court's attempt to sever the third-party claims against the RTC from the rest of the case could not insulate the principal claims from removal because the RTC continued to have an interest in the outcome of the principal claims. *Id.*

Further, in *Spring Garden Associates v. RTC*, 26 F.3d 412 (3d Cir. 1994), the Third Circuit held that the language of section 1441a(*l*)(1) granting jurisdiction over "any civil action, suit, or proceeding" to which the RTC is a party confers jurisdiction over "the entirety of any case to which the RTC is a party and not just those claims in such a case brought by or against the RTC." 26 F.3d at 415-16. The Third Circuit specifically held that claims against the RTC's co-defendants were not pendent claims. *Id.* at 417. *See generally In re Meyerland Co.*, 960 F.2d 512, 515 (5th Cir. 1992) ("The power conferred by FIRREA to invoke federal jurisdiction and to remove from state court is substantial. Access to federal courts in all actions to which it is a party allows the FDIC to develop and rely on a national and uniform body of law, consistent with eliminating the problems identified by Congress in having less rigorous state standards coexisting with federal ones." (citations omitted)), *cert. denied*, 506 U.S. 1049 (1993).

We conclude that the purpose of the RTC removal statute, 12 U.S.C. § 1441a(*l*), is to provide a federal forum for the entirety of any case to which the RTC is a party at the **[1071]** time of removal. To permit KPERS to circumvent this goal by prosecuting a competing suit in state court would therefore subvert the purpose of the RTC removal statute. Accordingly, we hold that the district court's injunction of KPERS's state suit against Peat, Marwick was "expressly authorized" by Congress and is permissible under the Anti-Injunction Act.[6]

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[6] KPERS argues that the All Writs Act, 28 U.S.C. § 1651(a), does not authorize the district court to enjoin KPERS from prosecuting its newly filed state court suit. Because we hold that 12 U.S.C. § 1441a(*l*) authorizes the district court's injunction, we do not address this argument.

III.

A.

KPERS argues that under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), the district court should have remanded this case to Kansas state court because any action by the district court could disrupt Kansas's complex statutory scheme surrounding KPERS. While *Burford* is concerned with protecting complex state regulatory schemes from interference by federal courts, *Burford*, 319 U.S. at 334; *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 360-62 (1989), there is no such threat in this case. KPERS has sued several defendants to recover money it lost in a bad investment. This case only requires the conduct of the defendants be measured against the duties imposed by tort and securities law. Consequently, the district court will not intrude on any complex state regulatory scheme protected by *Burford*. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 815-16 (1976) (holding *Burford* abstention inappropriate where state-law claims before the federal court will not affect state efforts to implement a uniform policy on a matter of substantial public concern). *Cf. Ankenbrandt v. Richards*, 504 U.S. 689, 705-06 (1992) (*Burford* abstention for domestic issues inappropriate where the domestic law question has no bearing on state-law tort claims before the federal court).

B.

KPERS also argues that the Supreme Court's decision in *Younger v. Harris*, 401 U.S. 37 (1971), requires the district court to abstain and remand this case to Kansas state court, or failing that, to at least abstain from enjoining KPERS's newly filed state court suit. Abstention under *Younger*, however, is inappropriate where a federal court has exclusive jurisdiction over a claim. *See International Ass'n of Entrepreneurs of America v. Angoff*, 58 F.3d 1266, 1271 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 774 (1996); *Levy v. Lewis*, 635 F.2d 960, 967 (2d Cir. 1980). Under 12 U.S.C.

§ 1441a, the district court has exclusive jurisdiction over the entire case involving the RTC once the RTC has removed the case to the district court. Thus, *Younger* abstention is inappropriate in this case.

We affirm the order of the district court.

APPENDIX B

In the
UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 95-3499WMKC

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM,
Appellant,

v.

REIMER & KOGER, etc., *et al.*,
Appellees.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Filed April 18, 1996

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff*,	)	
-vs-	)	
REIMER & KOGER ASSOCIATES, INC., A KANSAS CORPORATION, *et al.*, *Defendants*.	)	
	)	No. 92-0922-CV-W-9
MARK A. MORGAN, THOMAS S. MORGAN, and MARILYN J. FEINGOLD, Co-executors of the Estate of FRANK MORGAN, *et al.*, *Third Party Plaintiffs*,	)	Kansas City, Missouri Civil
-vs-	)	SEPT. 14, 1995
RESOLUTION TRUST CORPORATION, *Third Party Defendants*.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE D. BROOK BARTLETT,
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

DONNA M. TURNER, RPR, CM
United States court reporter
811 Grand Avenue, Room 443
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[excerpt]

[67]

THE COURT: Anybody else have anything to say? All right. I'm going to issue a temporary restraining order against KPERS from filing any further actions in the future against Shook Hardy & Bacon for any claim that is asserted in this case by KPERS against Shook Hardy & Bacon or related to or arising out of any claim asserted in this action.

I'm doing this primarily to maintain the status quo, to avoid further disruptions of this case by the actions of KPERS by filing identical claims in state court or anywhere else against Shook Hardy & Bacon. It disrupts this case. It makes it increasingly difficult and expensive to process the claims being asserted in this case. It undermines my ability to effectively manage this case to have claims asserted elsewhere, motions filed here, time taken up arguing about it when we have important issues to resolve in this case.

Furthermore, my concern is that the extension of the argument made by KPERS gives KPERS essentially a free ride in this case, immune from any kind of control by me **[68]** whatsoever. This is not an 11th Amendment issue in my view. The 11th Amendment is not implicated by this. No lawsuit is being filed against KPERS, no claim for relief is being asserted against KPERS in this case.

What is happening is a request is being made only to control the behavior of KPERS that is detrimental to the processing of this case, and to prohibit it from filing repetitive, identical, or similar claims in other courts when those claims are either pending here or easily could be pending here if they sought leave to amend were granted leave to amend.

I do not believe that under the clear and under the wording of the 11th Amendment, that the 11th Amendment was intended to affect the ability of a United States court to manage efficiently and fairly litigation pending in front of it.

No request has been made by any party in this case to grant relief against KPERS. No request and no claim is being prosecuted against a state of the United States by the citizens of another state. It is not an 11th Amendment issue, in my view.

I think the 11th Amendment, if interpreted to that extent, would give KPERS some kind of authority to resist the appropriate rules of procedure governing parties appearing in front of this or any other federal court. **[69]**

The terms of the temporary restraining order, as I stated, and the nature of the temporary restraining order is intended primarily to keep this situation as it presently exists until such time as the matter can be taken up with everybody having more of an opportunity to study the law applicable to this situation. And I'm fearful that ultimately this is just going to lead to another delay in the processing of this case, which it seems to me it's high time that people quit complaining about delay in this case and start dedicating themselves to getting it processed.

I've attempted to dedicate myself to that and now feel that I'm -- I am in a boat with fewer and fewer rowers, at least fewer and fewer rowers that are pulling together. I believe that this is a good example of the kind of thing that is causing great difficulty. I think, based on what's been presented here so far, it is not an unreasonable conclusion that what KPERS is doing is trying to avoid and evade the order of the 8th Circuit as to the proper law to be applied in this case by attempting to get into state court and have established some different law so that they can come running back over here and tell the 8th Circuit, no, you misread the law of the state of Kansas.

Obviously, the 8th Circuit Court of Appeals read the law of the state of Kansas differently than I did and I'm obligated to enforce that law in the way it was **[70]** announced by the 8th Circuit of Appeals.

Furthermore, this case arrives in this court, regardless of its present status, it arrived in this court as the result of an authority specifically granted by Congress to the RTC to bring this case here. The authority that Congress granted the RTC to bring this case to the United States District Court for the Western District of Missouri it seems to me does not allow, for it to be effective, KPERS to repeatedly run back to Kansas, file further suits, which again involve the RTC, which again involve the RTC removing.

The purposes of that whole statutory scheme, it seems to me, are undercut by the efforts of a party to repeatedly assert claims that

it knows will ultimately end up right back in this court as a result of removal by the RTC. In all, it seems to me that what is really going on here is a rather direct challenge to the supremacy clause of the United States Constitution and that the supremacy clause operates -- is operating and must be protected in its proper operation so that this court is afforded the ability which Congress intended for it to have to process this case.

And whether it's presently being processed under that removal right or under some other derivative right resulting from the original removal right seems to me to be [71] irrelevant. It is being processed under authority granted the United States District Court for the Western District of Missouri, and I believe that I have reasonable power and authority to govern the conduct of the litigants in front of me so as not to interfere with the efficient administration of justice in this case.

Now, we need to talk about when we're going to take this motion up on the request for preliminary injunctive relief. I guess there is the matter of the bond. I'll be more than happy to hear what any party wishes to say about the amount of the bond.

You know, I should say in addition, it also seems to me that there may well be a legitimate question of whether KPERS is protected by the 11th Amendment at all in its proprietary capacity. That is the law of this case at this point, and when states create agencies to operate in the manner in which I have determined that KPERS operates, I have some question about whether the 11th Amendment protects states who choose to operate in a proprietary capacity. But that's another matter that will be resolved at a future time, either in this court of some other court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	
-vs-	)	
REIMER & KOGER ASSOCIATES, INC., A KANSAS CORPORATION, *et al.*, *Defendants.*	)	
_____	)	No. 92-0922-CV-W-9
MARK A. MORGAN, THOMAS S. MORGAN, and MARILYN J. FEINGOLD, Co-executors of the Estate of FRANK MORGAN, *et al.*, *Third Party Plaintiffs,*	)	Kansas City, Missouri Civil
-vs-	)	SEPT. 28, 1995
RESOLUTION TRUST CORPORATION, *Third Party Defendants.*)	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE D. BROOK BARTLETT,
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

DONNA M. TURNER, RPR, CM
United States court reporter
811 Grand Avenue, Room 443
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[excerpt]

[102]

THE COURT: On September 13, 1995, Shook Hardy & Bacon filed a renewed application for temporary restraining order and preliminary injunction. On September 11, two days before, the Reimer & Koger defendants filed a motion for preliminary and permanent injunction and for attorney's fees. One day later, September 12, KPMG Peat Marwick and Robert Spence filed a motion to enjoin state court proceedings, and on September 13, Blackwell Sanders filed a renewed and amended motion for preliminary injunction.

September 21, KPERS filed its response to these motions, and on September 25, various defendants filed replies to KPERS' suggestions in opposition.

On September 19th, 1995, I entered a temporary restraining order enjoining KPERS from filing in any court claims against Shook Hardy & Bacon arising out of KPERS' investment in Home Savings Association.

On August 23, 1995, KPERS filed in the District Court of Shawnee County, Kansas, Case No. 95-CV-936 against Michael Russell and a relatively large number of other **[103]** defendants, among which were Reimer & Koger Associates, Inc., and then the individuals Reimer, Koger, Crew, Shinski, and Messick. Also defendants in that case were Shook Hardy & Bacon, Shook Hardy & Bacon, P.C., and various partners of Shook Hardy & Bacon.

Also on August 23, 1995, KPERS filed in the District Court of Shawnee County, Kansas, case No. 95-CV-937 against Peat Marwick, and based on this record, I'm not sure who else was a defendant in that case, what individuals, if any, but at least Peat Marwick was named.

On January 6th, 1995, KPERS filed a case against Blackwell Sanders in the District Court of Shawnee County, Kansas, case No. 95-CV-20, which case, after pending in Shawnee County, Kansas, from January to I assume sometime this month, although I'm not exactly sure of the date, was removed to the United States District Court for the Western District of Missouri by the RTC. The case

presently pends in this court.

With the exception of the Blackwell Sanders case, which this next comment is not intended to apply to, the claims asserted by KPERS in the other two cases filed recently in Kansas are substantially identical to and assert claims that are substantially identical to the claims asserted by KPERS against the named defendants in the Kansas case in this court. **[104]**

That's pretty fouled up. I'll take another shot at it here.

In the two August 23, 1995, cases filed in the District Court of Shawnee County, Kansas, the claims asserted by KPERS against the defendants in those cases are substantially the same, if not identical to, the claims asserted in this case by KPERS against the same defendants.

Based on the information furnished by the parties and at least insofar as it goes not disputed, the reason the August 23, 1995, cases were filed by KPERS was to attempt to obtain Kansas courts' more favorable rulings on the statue of limitations issue decided by the 8th Circuit Court of Appeals and also to escape a multitude of problems and issues that are causing delays in federal court. In other words, referring to, apparently, a multitude of problems and issues that are causing delays in this case.

The 11th Amendment issue.

KPERS asserts that it is immune from, protected by the 11th Amendment so far as these defendants' request for injunctive relief.

Defendants argue that KPERS has waived the 11th Amendment. Even assuming, which they do not concede, but even assuming that KPERS is the state of Kansas, a state can waive, by inference and by its actions, the protection **[105]** of the 11th Amendment. See for instance Hankins vs. Finney, F-I-n-n-e-l, 964 F.2d, 853 at 856. Certainly a state can, by its actions, waive the protection of the 11th Amendment. For instance, the general appearance by a state in federal court and proceeding to defend a case on the merits has been found to waive the protection of the 11th Amendment.

In this case, we have not appearance by KPERS as a defendant but we have KPERS as a plaintiff seeking relief. Now, had KPERS filed this case in this court, the issue of waiver would be so clear

that probably — the waiver would be so clearly established that it would not be worth talking about.

The complexity of the waiver analysis in this case arises from the fact that this case arrived here by operation of the removal statute. So I am left with the question of whether waiver by a state of 11th Amendment protection can occur when it's a plaintiff when it ends up in federal court as a result of the operation of the removal statute; in other words, is there that aspect of behavior, of voluntary behavior, that characterizes a waiver analysis and which justifies implying or concluding that by the voluntary behavior, a state has relinquished its claim to 11th Amendment immunity.

Two factors suggest to me that it has. First of **[106]** all, as a general matter when a plaintiff files a lawsuit, they are by implication, it seems to me, saying that they agree to be bound by the lawful application of the rules of procedure governing the pursuit of that case. They don't go in with one hand behind their back saying we'll abide by the rules and we agree to be bound by the rules so long as they work in our favor. If they don't work in our favor, then we disavow any responsibility for complying with those rules because we disagree with them.

So when KPERS initiated this lawsuit, although they may not have expected and might not have expressly known what would happen to their lawsuit and that it would ultimately end up in the United States District Court for the Western District of Missouri, it agreed, by being a plaintiff, to be bound by those rules and, therefore, it seems to me, its behavior is the equivalent of voluntary acceptance of the rules, and, therefore, can be used as an indication of waiving 11th Amendment protection.

For instance, had the case been removed to the United States District Court for the District of Kansas rather than the United States District Court for the District of Missouri, couldn't KPERS then assert some kind of 11th Amendment immunity? I think that stretches imagination a little. For instance, could KPERS have said, no, you can't file a counterclaim against us because, you **[107]** see, we're protected by the 11th amendment. We can sue you but you can't sue us.

Now, the second thing that causes me to believe that there was a waiver, in addition to KPERS being a plaintiff and asserting a claim, is that once in this court they continued to assert their claim; they continued to take advantage of the procedures of this court, discovery procedures; they continued to seek relief from and obtain rulings, some in their favor, some against them, but to obtain the benefits of being a litigant in this court, which equates to the kind of voluntary behavior that legitimately and properly can infer waiver of the 11th Amendment. Voluntarily participated pursuing claims in this court for their benefit, and by that, waive the protection of the 11th Amendment.

But there's another reason why the 11th Amendment doesn't protect them in the context of this case, even if the waiver argument is not resolved against KPERS. And that is that no suit or claim for affirmative relief is being brought against KPERS or being sought against KPERS. None of the defendants seeking injunctive relief are asserting a claim in law or equity against KPERS of the type that is covered by the 11th Amendment.

In this situation, we have KPERS, the litigant, KPERS, the plaintiff, who is asserting the claims. The **[108]** defendants, by their request for injunctive relief, are only requesting that KPERS, the litigant, abide by certain rules that apply to litigants in federal court, just the same as other litigants; that KPERS, the plaintiff, be subject to the same rules and principles of judicial administration that govern other litigants.

That is not the situation of Oregon vs. City, which KPERS relies upon.

The 11th Amendment does not prevent a United States District Court from controlling the litigants in a pending case. For instance, a penalty could be asserted against KPERS for contempt of court. A financial penalty could be asserted against KPERS for failing to comply with an order of the court; failing to carry out its discovery responsibilities.

Similarly, KPERS can be enjoined, restrained, prevented, if appropriate, from pursuing in other courts the same claims that are being asserted in this case.

Now, everything I have said up to now has assumed that KPERS is the state of Kansas barring agency of the state of Kansas qualifying for the protection of the 11th Amendment.

Because I believe on the record presented in this case, there is a reasonable argument that KPERS is the state of Kansas, under Hess vs. Port Authority, I have **[109]** assumed that — assumed without deciding, that KPERS is the state of Kansas. I am reluctant to decide it for a number of reasons, not the least of which is that apparently there is another judge of this court that has been taking evidence on this issue and apparently has it under advisement, and I'm not inclined to complicate that judge's life with a ruling at this point that might conflict with that judge's conclusion after a good deal more attention apparently to this issue than I have been afforded the opportunity to give to it.

One more 11th Amendment issue. The Reimer & Koger defendants are not collaterally estopped from disputing that KPERS is protected by the 11th Amendment. The argument that they are is based on the case of American International Specialty Lines Insurance Co. vs. Reimer & Koger, 874 F. Supp. 324, a decision of the District of Kansas in 1995.

In that case, the District Court for the District of Kansas concluded KPERS was an arm of the state for 11th Amendment purposes.

For the reasons stated by Reimer & Koger, and I'm not going to belabor it, the collateral estoppel is not applicable, the issues are not the same and the issue was not actually raised and litigated in that case in a manner sufficient to implicate and to raise collateral estoppel. **[110]**

Therefore, for all of those reasons, KPERS has not satisfied its burden of demonstrating that it is protected by the 11th Amendment in the circumstances of the issues raised in this case, and more specifically by the issues raised by the motions for injunctive relief.

I go no further, and nothing I have said should be interpreted as going any further than that.

Now, let me turn now to the — take up some issues having to do with the request for preliminary injunctive relief against KPERS

filing any further cases against certain defendants in Kansas on claims related to KPERS' investments in Home Savings Association.

KPERS opposes these requests on a number of grounds, one of which is the exercise of supplemental jurisdiction in the case was improper. The issue KPERS raises along this line — the arguments they make along this line with regard to the motions for injunctive relief are advanced by KPERS in support of their third motion, second or third motion, to remand which is pending to be taken up on October 18th, 1995.

For the purpose of ruling on these motions for injunctive relief at this time, I am going to follow the previous decisions that I have made, decisions of the 8th Circuit Court of Appeals, and will continue to follow those decisions and conclude that I do have jurisdiction, **[111]** supplemental jurisdiction, for the reasons I've stated, until we take up the motions on October 18th.

Naturally, obviously, if at that point I'm persuaded I have no jurisdiction, then anything I might do here today in the way of granting injunctive relief would be immediately rescinded. But I am not so overwhelmed by or so immediately persuaded by KPERS' arguments that I have no jurisdiction that I believe this approach runs any substantial risk of being improper.

However, by saying that, I'm not saying that I won't give full consideration to the motions, and may well be convinced by KPERS' eloquent counsel at the time that that motion to remand is taken up.

KPERS argues that the All Writs Act does not authorize the injunctive relief requested by those defendants who are seeking to restrain filing further cases against them. I do not agree with the position for the reasons that the defendants state. The All Writs Act does not restrict or place a limitation on the power of the court in an appropriate situation to enjoin duplicate cases from being pursued in other courts that would interfere with the processing of the pending case.

The All Writs Act grants broad injunctive powers to the United States courts, and among those powers is the power to control parties before this court in the filing of **[112]** duplicate and disruptive litigation.

The Anti-injunction Act speaks more directly and is a more likely source of restraint because it does speak directly to limitations on enjoining state court proceedings. However, the Anti-injunction Act does not apply to restraining future filings of state court cases. See Dombrowski vs. Pfister, 85 S. Ct. 1116.

Because I do not agree with KPERS that at this time on this record I lack jurisdiction to control the behavior of KPERS in filing other lawsuits against the parties who are defendants in this case , the question then becomes what is the proper standard to determine whether injunctive relief should be afforded. Northwest Airlines vs. American Airlines, 989 F.2d 1002, the 8th Circuit Court of Appeals, in an opinion written by Judge Bowman, states that injunctions of the type that are sought here are not subject to the Dataphase standards for injunctive relief, but instead are subject to standards set forth in United States Fire Insurance Co. vs. Goodyear Tire and Rubber Company, 920 F. 2d, 487 at 488, 489, a 1990 decision of the 8th Circuit Court of Appeals.

In Goodyear, the court calls attention to the well-established rule that in cases of concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case, and that in the **[113]** absence of compelling circumstances, the first-filed rule should apply.

Insofar as the future assertion of claims against these defendants are concerned, in cases filed in Kansas in the future, there has been no compelling circumstance presented which would prevent the application of the first-filed rule. The claims asserted in the case against these defendants in this case, the case that is presently pending in this court, are first-filed in comparison to cases that might be filed after this date asserting the same claims.

Therefore, under the Northwest Airlines standard, the defendants are entitled to injunctive relief against the filing of future cases asserting the same claims or related claims to those asserted in this case related to KPERS' investments in Home Savings Association.

Granting injunctive relief furthers the general federal policy against multiplicity of litigation and furthers the policies of most states against multiplicity of litigation; comports with common

sense; protects and furthers the ability of this court to as efficiently and as economically as possible resolve the issues raised in this case against these defendants free of the distractions, which the track record of this case demonstrate fully occur when efforts are made to assert the same claims in other **[113]** courts.

Even if one were to proceed with the analysis to consider the Dataphase requirements as sort of an advisory way to determine if the result of the first-filed rule is the appropriate result, one finds that to the extent Dataphase and its factors could be applied to this case, that the balance, after weighing the equities, favors granting injunctive relief, maintaining the status quo, the status quo being the pendency of and processing of these claims in this court, free of the distractions, expense, and effort caused by having to deal with other litigation raising the same issues.

The public interest cries out for the expeditious final resolution of the claims asserted by KPERS against these defendants. In light of the length of time the case has been pending in this court, the effort and expense which has been invested by all concerned in it, the public interest in the fair, efficient, and expeditious resolution of the dispute demands doing everything reasonable that can be done to assure that that public interest is achieved.

KPERS asserted public interest, or interest in obtaining a favorable resolution of issues that are ruled against it in this case by going to what is perceived to be a more friendly forum. It does not come close to balancing **[115]** out the public's real interest in the expeditious and final resolution of this litigation. It is much too simplistic and almost irrational to suggest the public has an interest in resolving this dispute one way or the other. To have this dispute resolve in a fair, unbiased forum is of far more concern to the public than who prevails.

So even if one were to engage in a Dataphase analysis, I believe that one would find that one would be led to the same conclusion that one reaches under the Northwest Airlines first-filed approach.

And, therefore, KPERS will be preliminarily enjoined. Therefore — I'll start that over again. Therefore, KPERS, its officers, trustees, and attorneys representing KPERS are enjoined,

upon the posting of an appropriate security or bond, from filing in any court, including the courts of the state of Kansas, any claims arising out of or related to KPERS' investments in Home Savings Association against Shook Hardy & Bacon, Shook Hardy & Bacon, P.C., and/or any partner of Shook Hardy & Bacon; against the Reimer & Koger defendants, that's Reimer & Koger Associates, Inc., and the individuals Reimer, Koger, Crew, Shinski, and Messick; against Blackwell Sanders Matheny Weary & Lombardi; and against Peat Marwick Mitchell and whoever the individual defendant —

MR. TONE: Robert Spence, your Honor. **[116]**

THE COURT: — Robert Spence, or against KMPG, Peat Marwick & Mitchell.

MR. JONES: Your Honor —

THE COURT: Yes.

MR. JONES: — with respect to Blackwell Sanders would your injunction go to protecting them from any suits against individual members of that firm?

THE COURT: Yes.

MR. JONES: Thank you.

THE COURT: So long as — I mean, so long as the claims or the actions claimed attempt to raise the same claims asserted in the case that's been removed here, that's presently pending in this court, yes. It certainly doesn't have anything to do with claims unrelated to Home Savings or anything else, but with that understanding, yes.

Insofar as the request by Peat Marwick & Mitchell for injunctive relief against KPERS from proceeding with KPERS vs. Peat Marwick Mitchell & Co., No. 95-CV-937 in the District Court of Shawnee County, Kansas, KPERS argues that such injunctive relief of the type requested is inappropriate and not permitted under the Anti-injunction Act, 28 U.S.C. Section 2283.

There are exceptions to the prohibitions of the Anti-injunction Act. Peat Marwick asserts that one of **[117]** those exceptions — or that a number of those exceptions apply.

One exception is if injunctive relief is expressly authorized by an act of Congress. The test for this exception, as to whether an act

of Congress qualifies as an expressly authorized exception to the Anti-injunction Act, is whether the act of Congress clearly creating a right readily enforceable in a federal court of equity could be given its intended scope only by the stay of a state court proceeding.

Injunction enjoining a second suit filed in state court is authorized if filing the second lawsuit would subvert the purposes of the removal statute.

Here, the purposes of allowing the RTC to remove not only a claim asserted against it but to remove the entire case in which a claim against the RTC is asserted would be subverted by allowing the plaintiff to continuously refile claims in state court against the defendants who were parties to the removed action. It puts a continuous burden on the RTC to make certain that its interests are not involved in or threatened by repetitive filings in the state court.

Based on the record in this case, the similarity of the relief sought in the later-filed state cases to the relief sought in this case against Peat Marwick, and based **[118]** on the other factual conclusions reached as to the motivation for filing the recent cases in state court, the recent case against Peat Marwick filed in state court was intended to defeat removal jurisdiction, was intended to carve up what was one case into separate cases with separate claims, all leading to a subversion of the RTC's right to remove the entire case, with all of the claims, to federal court.

Another exception to the Anti-injunction Act is the so-called relitigation exception. The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel. See Chick Kam Choo vs. Exxon, 108 S.CT. 1684. The relitigation exception prevents the costly and judicially wasteful redetermination of issues already decided by a federal court. The exceptions were placed in the Anti-injunction Act by Congress to ensure the effectiveness and supremacy of federal law.

However, an essential prerequisite of the application of the relitigation exception is that the claims the federal injunction insulates from litigation in state proceedings have actually been

decided by the federal court. See Daewoo Electronics vs. Western Auto Supply, 975 **[119]** F. 2d 474 at Page 477.

In this case, the claims on the merits against Peat Marwick have not been decided. However, the exception bars KPERS from alleging claims that fall outside the statute of limitations as determined by the 8th Circuit Court of Appeals.

Because I have concluded that that is part of the motivation for pursuing Peat Marwick and the other defendants, but Peat Marwick in Kansas in the August-filed cases, the relitigation exception is another ground for voiding the prohibition of the Anti-injunction Act.

Another exception is the in-aid-of-jurisdiction exception. Federal courts can enjoin where necessary to protect the federal court's ability to properly administer a case. See Atlantic Coastline Railroad vs. Brotherhood, 90 S. Ct. 1739, 1747.

Here, KPERS is, in part, attempting to relitigate and avoid a decision of the 8th Circuit Court of Appeals on the statute of limitations. By doing so, KPERS delays the resolution in this court of the issues presented, distracts the litigants from devoting their resources to the fair, efficient, and expeditious resolution of the issues in this case, increases the expense for all concerned, and therefore, the in-aid-of-jurisdiction exception is also satisfied. **[120]**

Applying the same analysis that I applied previously to the request to enjoin other lawsuits against the defendants in this case, Peat Marwick has satisfied the prerequisites of granting injunctive relief against KPERS, its officers, trustees, attorneys, from pursuing further the pending case in Shawnee County, Kansas.

The claims asserted in the case against Peat Marwick were first filed in the case that is presently pending here. There is no compelling circumstance that has been developed or shown that would justify allowing KPERS to pursue in two forums the same claim at the same time when the impetus, in part, was to avoid a decision on an issue entered in this case after a full and fair opportunity for all parties to express themselves on the issue. Forum-shopping to avoid adverse decisions result in a serious waste of limited judicial resources, endless relitigating of issues resolved between parties in the case, is inconsistent with principles

of federal judicial administration in most states.

So for all of those reasons, KPERS will be enjoined from pursuing that case in the state of Kansas against Peat Marwick & Mitchell, subject to the posting of adequate security or a bond.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	
v.	)	
REIMER & KOGER ASSOCIATES, INC., *et al.*, *Defendants.*	)	No. 92-0922-CV-W-9
FRANK MORGAN, et al., *Defendants and Third-Party Plaintiffs,*	)	Filed Oct. 2, 1995
v.	)	
RESOLUTION TRUST CORPORATION, *Third-Party Defendant.*	)	

ORDER GRANTING MOTIONS FOR PRELIMINARY INJUNCTION

On September 11, 1995, the Reimer & Koger defendants filed a Motion for Preliminary and Permanent Injunction.

On September 12, 1995, KPMG Peat Marwick LLP and Robert W.L. Spence filed a Motion to Enjoin State Court Proceedings.

On September 12, 1995, Blackwell Sanders Matheny Weary & Lombardi (Blackwell Sanders) filed a Renewed and Amended Motion for Preliminary Injunction.

On September 13, 1995, Shook, Hardy & Bacon filed a Renewed Application for a Preliminary Injunction.

In their motions for preliminary injunction, defendants and intervenor Blackwell Sanders seek to enjoin and restrain KPERS from filing future suits against them in any court, other than this one, for claims arising out of KPERS' investments in Home Savings Association.

In addition, KPMG Peat Marwick LLP and Robert W.L. Spence seek to enjoin KPERS from prosecuting further *KPERS V. Peat, Marwick, Mitchell & Co.*, No. 95-0937-CV, which is pending in the District of Shawnee County, Kansas.

A hearing was held on September 28, 1995, in which the parties presented oral arguments on the motions for preliminary injunctive relief.

Based on the findings of facts and conclusions of law stated on the record at the September 28, 1995, hearing, it is ORDERED that:

1) Shook, Hardy & Bacon's Renewed Application for a Preliminary Injunction is granted;

2) KPMG Peat Marwick LLP and Robert W.L. Spence's Motion to Enjoin State Court Proceedings is granted;

3) Reimer & Koger defendants' Motion for Preliminary and Permanent Injunction is granted;

4) Blackwell Sanders' Renewed and Amended Motion for Preliminary Injunction is granted;

5) pursuant to Rule 65 (c), Federal Rules of Civil Procedure, defendants' and intervenor Blackwell Sanders' preliminary injunctions are granted subject to each group of defendants and intervenor Blackwell Sanders Matheny Weary & Lombardi depositing with the Clerk of the Court $500 in security;

6) KPERS is enjoined from filing in any court, other than this one, claims against the following defendants that arise out of KPERS' investments in Home Savings Association: Shook, Hardy & Bacon; KPMG Peat Marwick LLP; Robert W.L. Spence; Reimer & Koger Associates, Inc., Ronald Reimer, Kenneth Koger, Robert Crew, Clifford Shinski, and Brent Messick;

7) KPERS is enjoined from filing in any court, other than this one, claims against intervenor Blackwell Sanders Matheny Weary & Lombardi, L.C. arising out of KPERS' investments in Home Savings Association; and

8) KPERS is enjoined from prosecuting further *KPERS v. Peat, Marwick, Mitchell & Co.*, No. 95-0937-CV, pending in the District Court of Shawnee County, Kansas.

/s/
D. BROOK BARTLETT
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

October 2, 1995

APPENDIX F

12 U.S.C. § 1441a(*l*)(1) and 1441a(*l*)(3)(A) govern the removal of state-court actions involving the Resolution Trust Corporation ("RTC") and provide in relevant part:

> **(*l*) Power to remove; jurisdiction**
>
> **(1) In general**
>
> Notwithstanding any other provision of law, any civil action, suit, or proceeding to which the [RTC] is a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction over such action, suit, or proceeding.
>
> * * *
>
> **(3) Removal and remand**
>
> **(A) In general**
>
> The [RTC], in any capacity and without bond or security, may remove any action, suit, or proceeding from a State court to the United States district court with jurisdiction over the place where the action, suit, or proceeding is pending, to the United States district court for the District of Columbia, or to the United States district court with jurisdiction over the principal place of business of any institution for which the [RTC] has been appointed conservator or receiver if the action, suit, or proceeding is brought against the institution or the [RTC] as conservator or receiver of such institution . . . .